

¹ This is the date contained in claimant's Application for Hearing filed on July 25, 2000, but claimant's exhibit 2 and respondent's exhibit A admitted into evidence at the December 7, 2001, preliminary hearing has claimant's last day worked as June 19, 2001.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the respondent's brief, the Board makes the following findings and conclusions:

Claimant injured his low back while performing production work for respondent that required claimant to perform strenuous physical activities of lifting, bending, and twisting. Claimant described an initial heavy lifting incident that occurred sometime in March or April of 2001. Claimant's pain then progressively worsened to first right-sided pain and then to low back and right leg pain. Claimant testified that after the first lifting incident he notified his supervisor, at that time, named Don and an accident report was completed. Thereafter, as claimant's low back and right leg pain worsened, he notified another supervisor named Mike Scott that he had low back and right leg pain and the work was causing the pain. But Mike Scott did not complete an accident report and did not provide claimant with medical treatment.

Claimant first sought medical treatment for his symptoms on his own through his family physician David Dunlap, M.D. Dr. Dunlap had claimant undergo diagnostic testing including a colonoscopy and a CT scan of the abdomen to rule out abdominal problems. Those tests were negative. After those diagnostic tests, Dr. Dunlap's assessment was musculoskeletal back pain. Dr. Dunlap then referred claimant to John Knudsen, III, M.D. for pain management.

Dr. Knudsen provided claimant with five epidural steroid injections between May 24, 2001, and July 19, 2001. Those injections did not benefit claimant. Dr. Knudsen placed claimant on light duty on May 24, 2001. Claimant testified he continued to work until June 18, 2001, and then had to leave work because he could no longer perform even light duty because of the pain and discomfort in his low back and right leg.

Claimant was also referred by Dr. Dunlap to Dr. David J. Metcalf for chiropractic adjustment treatments. Dr. Metcalf saw claimant from June 18, 2001, through June 22, 2001, with no improvement.

Claimant testified that in June of 2001, he also notified respondent's human resource manager Mary Faulkner and respondent's accountant Peggy J. Wiard that the reason he had to leave his employment was because his low back problems and those problems were the result of his work activities with respondent. Both of those individuals, at the preliminary hearing, testified in person before the ALJ and denied claimant informed either of them that his back and right leg pain was related to his work activities with respondent.

After claimant's attorney made a demand upon respondent for medical treatment in July 2001, instead of sending claimant to Dr. Trimble as recommended by Dr. Knudsen,

respondent sent claimant to Dr. Robert L. Eyster, M.D. for examination and evaluation. Dr. Eyster saw claimant on October 5, 2001. Claimant provided Dr. Eyster with a history of back and right leg pain from lifting at work. Dr. Eyster reviewed a previous MRI study that showed an L5-S1 right sided small bulging disc. After Dr. Eyster conducted a physical examination of claimant, he recommended a myelogram and CT scan. He then concluded, if that testing showed nerve impingement, then the patient probably is in need of a surgical procedure.

Claimant testified he had to leave work on June 18, 2001, because of the pain and discomfort in his low back and right leg. Thus, the Board finds claimant's accident date is June 18, 2001, his last day worked.²

The Board affirms the ALJ's finding that claimant provided respondent with timely notice of the accident. The Board finds that claimant's testimony that he notified his supervisor Mike Scott that he had back and right leg pain caused by his work activities before he was forced to quit his job because of the pain and discomfort on June 18, 2001, satisfies the statutory timely notice requirement.³

The Board is mindful that both representatives of the respondent that testified before the ALJ denied that claimant notified either of them that he had hurt his back at work. But claimant's supervisor, Mr. Scott, who claimant stated he also notified of the accident, did not testify. Furthermore, when there is conflicting testimony in the record, the credibility of the witnesses testifying before the ALJ becomes vital to the fact finders decision making process. Thus, because the ALJ had the opportunity to observe all of the witnesses, he was in the best position to assess their credibility. Here, the ALJ appears to have believed the testimony of claimant over the conflicting testimony of respondent's representatives. The Board, therefore, finds that some deference should be given to the ALJ because he had the opportunity to assess the credibility of all the witnesses. Thus, the ALJ's finding that claimant provided timely notice of accident to respondent is affirmed.

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Bruce E. Moore's December 11, 2001, preliminary hearing Order, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2001.

² See Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999) and Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

³ See *K.S.A. 44-520*.

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director